

54
No. 15788

United States
Court of Appeals
For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORATION,

Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Third Division.

FILED
JAN 22 1958
FBI - ALASKA

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Complaint (Cause No. 13,101)	20
Answer (Cause No. 10-297C—Justice Court) . .	10
Clerk's Certificate	38
Complaint (Cause No. 10-297C—Justice Court)	3
Exhibit A (Agreement)	6
Complaint for Declaratory Judgment and Other Relief (No. 13,503)	27
Designation of Record (Appellant's)	41
Judgment (No. 10-297C—in Justice Court)	17
Memorandum Supporting Appellee's Motion of Objection to Appellant's Designation of Rec- ord on Appeal	44
Memorandum Supporting Defendant's Motion to Dismiss (Cause No. 13,503)	33
Minute Order Denying Motion to File Amended Complaint (Cause No. 13,101)	26
Minute Order Rendering Court's Oral Decision	34
Motion to Dismiss (Cause No. 13,503)	32
Motion and Judgment of Dismissal with Preju- dice (Cause No. 13,503)	34

INDEX	PAGE
Motion for Leave to File Amended Complaint (Cause No. 13,101.....	19
Motion of Objection to Appellant's Designation of Record on Appeal.....	43
Names and Addresses of Attorneys.....	1
Notice of Appeal (Cause No. 13,503).....	36
Objections to Proposed Judgment (Cause No. 13,503)	35
Statement of Points on Appeal (Cause No. 13503)	37
Statement of Points on Appeal (U. S. Court of Appeals)	40
Stipulation (Cause No. 10-297C—in Justice Court)	12
Exhibit A—(Letter)	14
Exhibit B—(Minutes of City Council Meet- ing)	15

NAMES AND ADDRESSES OF ATTORNEYS

For the Appellant, City of Anchorage:

JAMES M. FITZGERALD,
City Attorney;

L. EUGENE WILLIAMS,
Assistant City Attorney,
Box 400, Anchorage, Alaska.

For the Appellee, Alaska Dairy Products:

MANDERS, BUTCHER, DUNN &
CONNOLLY;

JOHN C. DUNN,
First National Bank Bldg.,
Anchorage, Alaska.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297-C

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Plaintiff,

vs.

ALASKA DAIRY PRODUCTS CORP.,

Defendant.

COMPLAINT

Comes Now the City of Anchorage, plaintiff herein, and for cause of action against the defendant, alleges as follows:

I.

Plaintiff is a municipal corporation organized and existing by virtue of the laws of the Territory of Alaska and is situated in the Third Judicial Division thereof.

II.

Defendant is a domestic corporation organized and existing by virtue of the laws of the Territory of Alaska.

III.

Plaintiff alleges that on the 18th day of May, 1955, the defendant, Alaska Dairy Products Corporation, entered into a contract with the City of Anchorage, a copy of which is attached and incorporated herein

as if fully set forth. The defendant agreed to make an annual payment to the City of Anchorage in lieu of taxes and in consideration thereof the City of Anchorage allowed the defendant corporation to connect to the existing sewer facilities.

IV.

Plaintiff alleges that according to this contract said payment in lieu of taxes to be paid to the City was to be equal to the total City levy less the School District levy included therein, and the payments should be made when City property taxes are due and collected.

V.

Plaintiff alleges that the defendant has paid to the City, Six Hundred Fifty and 25/100 Dollars (\$650.25) which is a payment in lieu of real property taxes.

VI.

Plaintiff alleges that defendant's personal property has an assessed value of Forty-Six Thousand Dollars (\$46,000) on which amount the personal property taxes due the City would be in the amount of Four Hundred Sixty Dollars (\$460.00).

VII.

That one-half of the said sum of Four Hundred Sixty Dollars (\$460.00) became due and payable on or before the 15th day of February, 1956, and that if said first installment was not paid on said date the entire amount of tax became delinquent. That said

defendant did not pay the first one-half thereof by the date aforesaid, and that, therefore, the entire amount of tax became delinquent on the 16th day of February, 1956.

VIII.

That under the terms of said contract, defendant is indebted to plaintiff in the amount of Four Hundred Sixty Dollars (\$460.00).

IX.

That plaintiff has made demand on the defendant that the above amount be paid.

X.

Defendant has failed to pay the above amount as agreed to in the attached contract.

Wherefore, plaintiff prays for judgment against the defendant in the amount of Four Hundred Sixty Dollars (\$460.00); court costs incurred, attorney's fees, and for such other relief as to the court may seem equitable in the premises.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 11, 1956, U. S. Commissioner.

EXHIBIT A

Agreement
(Sewer Oustide City Limits)

This Agreement, made and entered into this 18th day of May, 1955, by and between the City of Anchorage, a municipal corporation, hereinafter referred to as the "City," and Alaska Dairy Products Corporation, hereinafter referred to as the "Owner";

Witnesseth:

1. The City will permit the owner to connect the property hereinafter described in Paragraph 2 of this agreement to the City sewer system under the conditions and provisions as set out herein.

2. The property, which the owner may connect to the City sewer system, is described as follows:

Lots 10, 11, Block 14A, East Addition to the City of Anchorage.

3. The owner will pay the City One Hundred Eighteen and 46/100 Dollars (\$118.46) as a hook-on fee. In addition to this hook-on fee, the owner will make annual payments in lieu of taxes to the City. Said payments in lieu of taxes to be equal to the total City levy, less the School District levy included therein. The payments, as provided in this section, shall be due when the City property taxes are due and collected in the same manner.

4. The owner shall install and maintain the sewer as provided in this agreement at his own expense,

and the City under no circumstances shall be liable for any debt contracted for the installation and maintenance of the sewer lines.

5. The City reserves the right to inspect the sewer installed as set forth herein at all times and may discontinue the rendering of said services upon failure to pay the amount as specified in Paragraph 3, or upon failure to perform any other condition as set out in this agreement.

6. The owner will submit plans for the sewer to the City Engineer for approval, prior to the installation, and shall perform all work in installing and maintaining the sewer system as set out in this agreement according to the specifications required by the Engineer.

7. Payment, as set out in this agreement, shall not preclude the City of Anchorage from levying special assessments for the installation and maintenance of sewer facilities, and owner agrees to said assessment as though the facilities herein provided did not exist.

8. The owner will secure approval from the Fairview Public Utility District for the installation of this sewer, before any work is commenced under the provisions of this agreement.

9. The covenants and conditions herein contained shall be binding upon the owner, his transferees, assignees, and successors in interests.

The word "owner" as used herein includes persons, firms and corporations, both plural and singular.

Dated at Anchorage, Alaska, the day and year first above written.

CITY OF ANCHORAGE,

By /s/ GEORGE C. SHANNON,
City Manager.

ALASKA DAIRY PRODUCTS
CORP.,

By /s/ GEORGE D. JACKSON,
Owner.

Executed in the presence of:

/s/ ELIZABETH KERBY,

/s/ ERNEST P. LaBATE.

United States of America,
Third Judicial Division,
Anchorage Recording Precinct,
Territory of Alaska—ss.

Before me, the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned, qualified, and sworn as such Notary Public, this day personally appeared George C. Shannon, known to me personally to be the City Manager of the municipal corporation that executed the within instrument, and he acknowledged to me that the said instrument

was the voluntary act and deed of the said municipal corporation, and that his act of executing said instrument on behalf of said municipal corporation was duly authorized by ordinance/resolution passed by the City Council of said municipal corporation.

Witness my hand and Notarial Seal this 18th day of May, 1955.

[Seal]

ERNEST P. LaBATE,
Notary Public in and for
Alaska.

My commission expires: 5/18/57.

United States of America,
Third Judicial Division,
Anchorage Recording Precinct,
Territory of Alaska—ss.

Before the undersigned, a Notary Public in and for the Territory of Alaska, duly commissioned, qualified and sworn as such Notary Public, this day personally appeared, at Anchorage, Alaska, George D. Jackson, each/ to me personally known, and known to me to be the person described in and who executed the above instrument, and he/they and each of them, severally/ acknowledged to me that he/they and each of them, respectively/executed said instrument freely and voluntarily, with knowledge of its contents, for the uses and purposes therein mentioned.

Witness my hand and Notarial Seal this 18th day of May, 1955.

/s/ ERNEST P. LaBATE,
Notary Public in and for
Alaska.

My commission expires: 5/18/57.

[Duplicate agreement attached.]

[Endorsed]: Filed Dec. 10, 1956. U. S. Commissioner.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297C

[Title of Cause.]

ANSWER

Comes Now the defendant and answers the complaint of plaintiff herein in the manner following.

I.

Defendant admits the allegations set forth in paragraphs I to V, inclusive, of plaintiff's complaint.

II.

With respect to paragraph VI of plaintiff's complaint, defendant admits that the assessed value of its personal property is Forty-Six Thousand Dollars (\$46,000.00); however, defendant denies that it owes any money whatsoever to the City of Anchorage.

III.

With respect to paragraph VII of plaintiff's complaint, defendant admits that the allegations contained therein would be true if defendant, in fact, owed the City of Anchorage any money; however, defendant denies that it owes the City of Anchorage any money whatsoever.

IV.

Defendant denies the allegations set forth in paragraph VIII of plaintiff's complaint.

V.

Defendant admits the allegations set forth in paragraph IX of plaintiff's complaint.

VI.

With respect to paragraph X of plaintiff's complaint, defendant admits that it has failed to pay plaintiff; however, defendant denies that it has agreed to pay plaintiff.

Wherefore, defendant prays that plaintiff take nothing by virtue of its complaint filed herein and that defendant be awarded judgment against plaintiff for its costs and disbursements herein, including a reasonable attorney's fee and for such other relief as the court may deem just in the premises.

/s/ JOHN C. DUNN.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 10, 1956. U. S. Commissioner.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297C

[Title of Cause.]

STIPULATION

Comes now the plaintiff, through its attorney, L. Eugene Williams, and the defendant, through its attorney, John C. Dunn, and stipulate and agree as follows:

I.

That, attached hereto and marked Exhibit A, is a true copy of the letter written by defendant and delivered to plaintiff and that said letter is the first written evidence of the negotiations leading up to the written contract which is in dispute herein.

II.

That, attached hereto and marked Exhibit B, is a true copy of the minutes of the meeting of the City Council of plaintiff at which the execution of said contract was authorized and that said minutes accurately reflect what took place at said meeting of the City Council.

III.

That the contract attached to the complaint herein filed as Exhibit A is a true copy of the contract executed by plaintiff and defendant.

IV.

That the sewer line which is the subject of said contract has been installed and is in use.

V.

That, prior to the execution of said contract, it was mutually agreed between plaintiff and defendant that the Lot 12 mentioned in said letter and minutes of April 26, 1955, be excluded from said contract and that Lot 12 is in no way concerned with the matters in dispute herein.

VI.

That, except for the amount of money claimed by plaintiff to be owed plaintiff from defendant, the sole question to be decided herein is whether or not the word "property" as used in said contract means real property or whether it means real and personal property.

VII.

That the question of the meaning of the word "property" may be decided from the facts as stipulated herein and an examination of Exhibits A and B attached hereto, and of said contract; save and except that, in the event this Court rules that evidence is admissible as to the intent of the parties as to the meaning of "property" at the time of execution of said contract, plaintiff may call George Shannon, the City Manager, and B. W. Boeke, the City Clerk, to prove such intent of plaintiff, and defendant may call George Jackson, president of defendant, to prove the intent of defendant.

VIII.

That, should this Court decide that "property" means real property alone, judgment may be rendered in favor of defendant as prayed.

IX.

That, should this Court decide that "property" means real and personal property, there will, nevertheless, remain a question as to the amount of money which plaintiff is entitled to recover and that this amount, if any, will be determined at a later date, either by stipulation of the parties hereto or upon subsequent proof to be furnished this Court.

Dated at Anchorage, Alaska, December 10, 1956.

/s/ L. EUGENE WILLIAMS,
Attorney for Plaintiff.

/s/ JOHN C. DUNN,
Attorney for Defendant.

EXHIBIT A

Page 3

April 26, 1955.

Mr. George Shannon,
City Manager,
City of Anchorage,
Anchorage, Alaska.

Dear Mr. Shannon:

We request permission to install a sewer connection from our dairy, 931 East Sixth Avenue, to the existing sewer line on Sixth Avenue between Gambell and Fairbanks.

We understand the conditions and agree to the following:

1. We will pay in lieu of taxes a sum equal each year, we are connected to the City of Anchorage sewer, to taxes on our property which consist of Lots 10, 11, and 12 in Block 14A of the East Addition.

2. We will install and maintain the above sewer line at our expense.

3. We will complete the Sixth Avenue portion of the sewer line within the city limits, before, and in time, to not hinder the paving of this street.

4. We agree that the installation of this sewer line will not exempt us from any present or future sewer assessment or improvement district of the City of Anchorage or others.

Plans for the construction of this sewer line have been submitted, by us, to the City Engineer.

Yours very truly,

ALASKA DAIRY PRODUCTS
CORP.,

GEORGE D. JACKSON.

GDJ :jn

EXHIBIT B

Page 4

Minutes of the Regular Meeting of the City Council
Held on April 26, 1955, at 8:00 P.M.

The meeting was called to order by Mayor Taylor and the following councilmen reported present: Peterson, White, Engebret, A. Anderson, Davis.

Absent: J. Anderson. City officials present: Manager, Attorney, Chief of Police, Building Inspector, Telephone Superintendent, Comptroller, Planning Director, Clerk.

* * *

“The City Manager read a letter from Mr. George Jackson representing the Alaska Dairy Products Corporation, 931 East Sixth Avenue, requesting permission to install a sewer connection from the dairy, 931 East Sixth Avenue, to the existing sewer line on Sixth Avenue between Gambell and Fairbanks Streets, and agreeing to the following: 1. To pay in lieu of taxes a sum equal to taxes on their property, consisting of Lots 10, 11 and 12, Block 14A, East Addition, for each year they are connected to the City sewer. 2. To install and maintain the above sewer line at their own expense. 3. To complete the Sixth Avenue portion of the sewer line within the City limits before, and in time, not to hinder the paving of this street. 4. That the installation of this sewer line will not exempt them from any present or future sewer assessment or improvement district of the City of Anchorage or others.

“It was moved by White and seconded by A. Anderson that the request of the Alaska Dairy Products Corporation, to install a sewer connection from their plant at 931 East Sixth Avenue to the existing sewer line on Sixth Avenue between Gambell and Fairbanks Streets, be approved under the conditions, Items 1, 2, 3, and 4 outlined above, as per their letter of April 26, 1955. All voted in the affirmative.”

* * *

Certificate.

I, B. W. Boeke, City Clerk—Treas. of the City of Anchorage, Alaska, keeper and custodian of the records of said city, do hereby certify that the following is a true, full and correct excerpt of the Minutes of the City Council held on April 26, 1955.

Witness my hand and the seal of the City of Anchorage, Alaska, this 27th day of August, 1956.

.....,
B. W. BOEKE,
City Clerk-Treas.

[Endorsed]: Filed Dec. 10, 1956. U. S. Commissioner.

In the Justice Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. 10-297C

[Title of Cause.]

JUDGMENT

This Matter came before the Court December 10, 1956, at which time plaintiff appeared through its Assistant City Attorney, L. Eugene Williams, and through its City Manager and City Clerk, and defendant appeared through its attorney, John C. Dunn, and its President; and counsel for the respective parties hereto having filed herein a stipulation with respect to various relevant facts; and each

party hereto having produced witnesses and adduced testimony in support of their respective contentions; and the Court being fully informed.

Now, Therefore, it is hereby ordered, adjudged and decreed that plaintiff take nothing by virtue of its complaint filed herein; that judgment is hereby entered in favor of defendant; and that defendant recover from plaintiff a reasonable attorney's fee of Sixty-Nine and no/100 Dollars (\$69.00).

Done in Open Court at Anchorage, Alaska, this 2nd day of Jan., 1957.

[Seal] /s/ WARREN C. COLVER,
Ex-Officio Justice of the Peace.

Copy received and approved for entry January 2, 1957.

/s/ L. EUGENE WILLIAMS,
Attorney for Plaintiff.

1/2/57—Oral notice of appeal given this date—
(W.C.C.) in open Court.

[Endorsed]: Filed Jan. 2, 1957.

In the District Court for the District of Alaska
Third Division

No. A-13,001

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Plaintiff,

vs.

ALASKA DAIRY PRODUCTS CORP.,

Defendant.

MOTION FOR LEAVE TO FILE
AMENDED COMPLAINT

Plaintiff moves the court for leave to file an amended complaint, a copy of which is attached hereto.

Plaintiff on or about the 11th day of October, 1956, filed a complaint in the Justice Court against Alaska Dairy Products Corp. Judgment was obtained by the defendant and said cause was appealed to this court. The Justice Court is a court of limited jurisdiction and the remedy of declaratory judgment which is available under the Federal Rules is not available in that court and the allowance of an amended complaint will eliminate the need to file a separate action.

The Justice Court is a court of limited jurisdiction and the equitable remedy of reformation was not available, and the facts as presented in the

amended complaint may entitle plaintiff to a reformation.

Legislation passed by the 1957 Legislature raised a further question which was not litigated in the court below.

Subsequent to the filing of this complaint and the decision therein in the Justice Court, plaintiff has had trouble with certain other of its contracts, similar in nature to this one, and the duly elected council of the City of Anchorage is desirous of putting to rest the problems concerned with the services rendered under this and other similar contracts.

Wherefore, plaintiff respectfully prays that leave may be granted to file an amended complaint in this cause alleging the matters of fact as they appear in the amended complaint hereto attached.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

Points and authority: Rule 15A, Federal Rules of Civil Procedure.

[Title of District Court and Cause.]

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

Comes Now the City of Anchorage, plaintiff herein, and for first claim for relief against the defendant alleges as follows:

I.

Plaintiff is a municipal corporation organized and existing by virtue of the laws of the Territory of Alaska and is situate in the Third Judicial Division thereof.

II.

Defendant is a domestic corporation organized and existing by virtue of the laws of the Territory of Alaska.

III.

Plaintiff alleges that on the 18th day of May, 1955, the defendant, Alaska Dairy Products Corporation, entered into a contract with the City of Anchorage, a copy of which is attached and incorporated herein as if fully set forth, wherein defendant agreed to make an annual payment to the City of Anchorage in lieu of taxes and, in consideration thereof, the City of Anchorage allowed the defendant corporation to connect to the existing sewer facilities.

IV.

Plaintiff alleges that according to this contract, said payment in lieu of taxes to be paid to the City, was to be equal to the total City levy less the School District levy included therein, and the payments should be made when City property taxes are due and collected.

V.

Plaintiff is now and was at all times material to this action performing under the terms of the contract and is furnishing sewer facilities to the defendant.

VI.

Plaintiff alleges that the defendant has paid to the City, Six Hundred Fifty and 25/100 (\$650.25) which is a payment in lieu of real property taxes.

VII.

Plaintiff alleges that defendant's personal property has an assessed value of Forty-six Thousand Dollars (\$46,000) on which amount the personal property taxes due the City would be in the amount of Four Hundred Sixty Dollars (\$460.00).

VIII.

That under the terms of said contract, defendant is indebted to plaintiff in the amount of Four Hundred Sixty Dollars (\$460.00).

IX.

That plaintiff has made demand on the defendant that the above amount be paid.

X.

Defendant has failed to pay the above amount as agreed to in the attached contract.

Comes Now the plaintiff herein and for second claim for relief in the alternative alleges:

I.

Plaintiff realleges paragraphs I, II, III, IV, and V of the first claim for relief.

II.

Prior to the execution of said agreement, defendant had agreed and understood that the payment by the defendant to the plaintiff for services to be rendered would be equal to the total City levy including real and personal property taxes which would be paid by the defendant were he located within the City limits of Anchorage.

III.

That by mutual mistake of the plaintiff and the defendant the said written agreement did not embody the actual agreement if the wording in Paragraph 3 of the contract means other than was stated in the paragraph preceding this.

IV.

The plaintiff through its duly authorized agent, the City Manager, acting under the direction of the City Council executed the agreement which did not embody the actual agreement as hereinabove alleged.

V.

Plaintiff's City Manager followed the direction and intent of the Council in so attempting to contract.

Comes Now the plaintiff herein and for third claim for relief in the alternative alleges:

I.

Plaintiff herein files this amended Complaint for Declaratory Judgment under Federal Declaratory

Judgment Act, 28 USCA, Section 2201, against the defendant, Alaska Dairy Products Corporation, and avers as follows:

II.

Plaintiff realleges Paragraphs I, II, III, IV, and V of first claim for relief.

III.

An actual controversy of a justiciable nature exists between plaintiff and defendant, involving their rights and liabilities under a contract entered into between them, and dependent upon the construction of their contract, which controversy may be determined by a judgment in this action, without other suits.

IV.

That this contract was entered into by the City Manager with authority from the duly elected and qualified council during the year 1955.

V.

Plaintiff alleges that the furnishing of sewer services by the City of Anchorage is performing a governmental function.

VI.

Plaintiff alleges that it has other contracts of similar nature and the determination of rights and liabilities of this contract will settle questions arising under these other contracts and avoid the necessity of multiple litigation.

VII.

Plaintiff, City of Anchorage, through its present duly elected counsel, has expressed a desire to terminate these contracts as being burdensome and causing financial loss which is not to the best interests of the City of Anchorage and therefore not in the best interests of the citizens of the City.

VIII.

Plaintiff, City of Anchorage, can only act within the limits of authority delegated it by the Territory of Alaska.

IX.

Plaintiff alleges that the furnishing of sewage facilities to persons outside the city limits of Anchorage may have been outside the scope of the authority delegated to the City and contracts made thereunder may be void or voidable.

Wherefore, plaintiff prays that it may have judgment against the defendant as follows:

1. That judgment be entered against the defendant in the amount of Four Hundred and Sixty Dollars (\$460.00) plus court costs and attorney's fees, or

2. That by decree of this court, the hereinabove-mentioned contract of May 18, 1955, be reformed to conform with the actual agreement of the parties, and

3. That the Court declare the rights and duties of said contract of May 18, 1955, and the controversy

stated in this complaint and determine the following:

a. Whether or not the City of Anchorage had authority to enter into such agreement.

b. If the City had no authority to enter into such agreement, determine that this agreement is void or voidable.

c. Declare that the present City Council is not bound by a contract to perform governmental functions made by a previous Council and therefore may terminate this agreement without liability.

.....,
L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

[Endorsed]: Filed June 6, 1957.

[Title of District Court and Cause.]

MINUTE ORDER OF JUNE 14, 1957, DENYING
MOTION TO FILE AMENDED COM-
PLAINT

Now at this time, upon the Court's motion:

It Is Ordered that the motion to file amended complaint in the above cause be and hereby is denied.

In the District Court for the District
of Alaska, Third Division

No. A-13,503

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Plaintiff,

vs.

ALASKA DAIRY PRODUCTS CORPORA-
TION,

Defendant.

COMPLAINT FOR DECLARATORY
JUDGMENT AND OTHER RELIEF

Comes Now the City of Anchorage, plaintiff
herein, and for first claim for relief against the
defendant alleges as follows:

I.

Plaintiff herein files this amended Complaint for
Declaratory Judgment under Federal Declaratory
Judgment Act, 28 USCA, Section 2201, against the
defendant, Alaska Dairy Products Corporation, and
avers as follows:

II.

An actual controversy of a justiciable nature ex-
ists between plaintiff and defendant, involving their
rights and liabilities under a contract entered into
between them, and dependent upon the construction
of their contract and dependent upon the validity

of their contract, which may be determined by a judgment in this action, without other suits.

III.

Plaintiff is a municipal corporation organized and existing by virtue of the laws of the Territory of Alaska and is situate in the Third Judicial Division thereof.

IV.

Defendant is a domestic corporation organized and existing by virtue of the laws of the Territory of Alaska.

V.

Plaintiff alleges that on the 18th day of May, 1955, the defendant, Alaska Dairy Products Corporation, entered into a contract with the City of Anchorage, a copy of which is attached and incorporated herein as if fully set forth, wherein defendant agreed to make an annual payment to the City of Anchorage in lieu of taxes and, in consideration thereof, the City of Anchorage allowed the defendant corporation to connect to the existing sewer facilities.

VI.

Plaintiff is now and was at all times material to this action performing under the terms of the contract and is furnishing sewer facilities to the defendant.

VII.

That this contract was entered into by the City Manager with authority from the duly elected and qualified Council during the year 1955.

VIII.

Plaintiff alleges that the furnishing of sewer services by the City of Anchorage is performing a governmental function.

IX.

Plaintiff alleges that it has other contracts of similar nature and the determination of rights and liabilities of this contract will settle questions arising under these other contracts and avoid the necessity of multiple litigation.

X.

Plaintiff, City of Anchorage, through its present duly elected Council has expressed a desire to terminate this contract as being burdensome and causing financial loss which is not to the best interests of the citizens of the City, but cannot do so without a determination by the Court of its right to do so without subjecting the City to possible liability.

XI.

Plaintiff, City of Anchorage can only act within the limits of authority delegated it by the Territory of Alaska; such powers are found generally in 16-1-35 ACLA 1949.

XII.

Plaintiff alleges that the furnishing of sewage facilities to persons outside the city limits of Anchorage was outside the scope of the authority delegated to the City and contracts made thereunder were void.

Comes Now the plaintiff herein and for second claim for relief alleges:

I.

Plaintiff realleges Paragraphs III, IV, V, and VI of the first claim for relief.

II.

Plaintiff alleges that, according to this contract, said payment in lieu of taxes to be paid to the City, was to be equal to the total City levy less the School District levy included therein, and the payments should be made when City property taxes are due and collected.

III.

Prior to the execution of said agreement, defendant had agreed and understood that the payment by the defendant to the plaintiff for services to be rendered would be equal to the total City levy including real and personal property taxes which would be paid by the defendant were he located within the City limits of Anchorage.

IV.

That by mutual mistake of the plaintiff and the defendant the said written agreement did not embody the actual agreement if the wording in Paragraph 3 of the contract means other than was stated in the paragraph preceding this.

V.

The plaintiff through its duly authorized agent, the City Manager, acting under the direction of the

City Council, executed the agreement which did not embody the actual agreement as hereinabove alleged.

VI.

Plaintiff's City Manager followed the direction and intent of the Council in so attempting to contract.

Wherefore, plaintiff prays that it may have judgment against the defendant as follows:

1. That by decree of this court, the hereinabove-mentioned contract of May 18, 1955, be reformed to conform with the actual agreement of the parties, and

2. That the Court declare the rights and duties under contract of May 18, 1955, and the controversy stated in this complaint and determine the following:

- a. Whether or not the City of Anchorage had authority to enter into such agreement.

- b. That the City had no authority to enter into such agreement, and, therefore, determine that this agreement is void.

- c. Declare that the present City Council is not bound by a contract to perform governmental functions made by a previous Council and, therefore, may terminate this agreement without liability.

3. For Court costs incurred, reasonable attorney's fees, and for such other and further relief as

to the Court seems just and equitable in the premises.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

[Agreement—see pages 6 to 8 of this printed record.]

[Endorsed]: Filed June 17, 1957.

[Title of District Court and Cause.]

No. 13-503

MOTION TO DISMISS

Comes Now the Defendant, through its attorneys, Manders, Butcher, Dunn & Connolly, and moves the Court to dismiss the above-entitled action for the following reasons:

(a) The Complaint filed herein fails to state a claim upon which relief can be granted plaintiff against defendant;

(b) All matters raised by the Complaint filed herein have already been decided by this Court;

(c) Plaintiff is barred from raising the matters complained of herein by virtue of res adjudicata and improper joinder;

(d) The Complaint filed herein is nothing more

than an attempt to avoid the effect of a previous order of this Court.

/s/ JOHN C. DUNN,
Attorney for Defendant.

Receipt of Copy Acknowledged.

[Endorsed]: Filed July 29, 1957.

[Title of District Court and Cause.]

No. 13-503

MEMORANDUM SUPPORTING
DEFENDANT'S MOTION TO DISMISS

* * *

Plaintiff has waived whatever rights it may have initially had to seek the relief requested in 13-503 by virtue of having filed the original action numbered 10-297C before the U. S. Commissioner for the Anchorage Precinct and then appealing the same to this Court as 13-001.

* * *

Respectfully submitted.

/s/ JOHN C. DUNN, of
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 20, 1957.

[Title of District Court and Cause.]

No. A-13,503

MINUTE ORDER OF SEPT. 5, 1957,
RENDERING ORAL DECISION

Before: The Honorable J. L. McCarrey, Jr.,
District Judge.

Now at this time, arguments having heretofore and on the 12th day of August, 1957, been had in the above cause, and the Court having reserved its decision,

Whereupon, Court now renders its oral decision, and now grants motion to dismiss, with prejudice for the reason a declaratory judgment act is procedural and does not create new rights upon a cause of action previously decided. Issues decided in initial action filed by a party are conclusively determined as between the parties under the doctrine of res judicata, and the Court directs counsel for movant to prepare and submit written order accordingly.

[Title of District Court and Cause.]

No. 13-503

MOTION AND JUDGMENT OF DISMISSAL
WITH PREJUDICE

This matter came before the Court on August 12, 1957, on the motion of Defendant, through its at-

torneys Manders, Butcher, Dunn & Connolly; at which time Defendant appeared through his said attorneys and Plaintiff through its Assistant City Attorney Mr. L. Eugene Williams, Esq.; and, at which time the Court heard argument and examined authorities advanced and presented by counsel for all parties hereto, and being fully informed,

Now, therefore, it is hereby Ordered, Adjudged and Decreed that the above-entitled action be, and the same hereby is, dismissed with prejudice; and

It is further ordered, adjudged and decreed that Defendant is granted judgment against Plaintiff herein for his costs in defending this action which consists of an attorney's fee which is hereby assessed in the amount of \$75.00.

Done in Open Court at Anchorage, Alaska, this 12th day of September, 1957.

/s/ J. L. McCARREY, JR.,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed and entered Sept. 12, 1957.

[Title of District Court and Cause.]

No. 13,503

OBJECTIONS TO PROPOSED JUDGMENT

Plaintiff objects to Paragraph 2 of the proposed judgment of dismissal for the reason that it fails to

set out the reasoning and language contained in the minute order.

Dated at Anchorage, Alaska, this 16th day of September, 1957.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

9-17-57.

Objection is overruled since the reason for the court's ruling was given in its oral opinion and a judgment is not a proper document to incorporate findings and conclusions.

/s/ J. L. McC.

Receipt of copy acknowledged.

[Endorsed]: Filed Sept. 16, 1957.

[Title of District Court and Cause.]

No. A-13,503

NOTICE OF APPEAL

To: The Clerk of the District Court, Third Division,
District of Alaska:

Sir:

Notice is hereby given that the City of Anchorage, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of the District Court for

the Third Division, District of Alaska, dismissing with prejudice as prayed for by Alaska Dairy Products Corporation, the action of the City of Anchorage, which action was dismissed on the 12th day of September, 1957.

/s/ L. EUGENE WILLIAMS,
Attorney for Plaintiff City of
Anchorage.

[Title of District Court and Cause.]

No. A-13,503

STATEMENT OF POINTS RELIED ON

1. The court erred in not allowing plaintiff to amend its complaint after appeal from Justice Court in Cause No. 13,001.
2. The Justice Court is a court of limited jurisdiction and its jurisdiction is statutory.
3. Additional relief sought by plaintiff in District Court after appeal from Justice Court where trial is de novo was not available in the court below.
4. The Court erred in granting defendant's Motion to Dismiss.
5. The Court erred in ruling plaintiff's claim for relief was previously determined by Justice Court.

6. The Justice Court has no equitable jurisdiction.

7. The Justice Court had no jurisdiction to try an action for declaratory judgment.

8. The pleadings in Justice Court did not plead a claim for relief in the nature of reformation.

9. The pleadings and original action in Justice Court pleaded no claim for relief under the Declaration Judgment Act.

10. The judgment for defendant is contrary to law.

/s/ L. EUGENE WILLIAMS,
Attorney for the Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 3, 1957.

[Title of District Court and Cause.]

No. A-13,503

CLERK'S CERTIFICATE
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure and the designation of counsel for the plaintiff-appellant and coun-

sel for the defendant-appellee, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Judgment of Dismissal filed and entered in the above-entitled cause by the above-entitled court on September 12, 1957.

Dated at Anchorage, Alaska, this 5th day of November, 1957.

[Seal] /s/ WM. A. HILTON,
Clerk.

[Endorsed]: No. 15788. United States Court of Appeals for the Ninth Circuit. City of Anchorage, a Corporation, Appellant, vs. Alaska Dairy Products Corporation, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed November 7, 1957.

Docketed November 15, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS

The Appellant herein makes the following statement of points:

1. The court erred in not allowing appellant to amend its complaint after appeal from Justice Court in Cause No. A-13,001.

2. The Justice Court is a court of limited jurisdiction and its jurisdiction is statutory.

3. Additional relief sought by appellant in District Court after appeal from Justice Court where trial is de novo was not available in the court below.

4. The court erred in granting appellee's Motion to Dismiss.

5. The court erred in ruling appellant's claim for relief was previously determined by Justice Court.

6. The Justice Court has no equitable jurisdiction.

7. The Justice Court had no jurisdiction to try an action for declaratory judgment.

8. The pleadings in Justice Court did not plead a claim for relief in the nature of reformation.

9. The pleadings and original action in Justice Court pleaded no claim for relief under the Declaration Judgment Act.

10. The judgment for defendant is contrary to law.

/s/ JAMES M. FITZGERALD,

/s/ L. EUGENE WILLIAMS,

Attorneys for Appellant, City
of Anchorage.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 15, 1957.

In the United States Court of Appeals
for the Ninth Circuit

No. 15788

CITY OF ANCHORAGE, a Municipal Corpora-
tion,

Appellant,

vs.

ALASKA DAIRY PRODUCTS CORPORA-
TION,

Appellee.

DESIGNATION OF RECORD

Appellant, City of Anchorage, by its attorneys, hereby designates under Rule 17 (6) of the United States Court of Appeals, Ninth Circuit, and Rule 75 of the Federal Rules of Civil Procedure, the fol-

lowing to constitute the transcript of record on appeal in the above-entitled case:

Name of Instrument and Date Filed or Entered

1. Complaint in Cause No. A-13,001 as originally filed in Justice Court in Cause No. 10,297C and exhibit attached to Complaint, October 11, 1956.

2. Answer to Cause No. A-13,001 as originally filed in Justice Court in Cause No. 10,297C, December 10, 1956.

3. Judgment entered in Justice Court appearing in transcript of appeal in Cause No. A-13,001 with notation of oral Notice of Appeal, January 2, 1957.

4. Motion for Leave to File Amended Complaint and Amended Complaint Accompanying Motion, June 6, 1957.

5. Minute Order denying leave to file Amended Complaint, June 14, 1957.

6. Complaint in Cause No. A-13,503, June 17, 1957.

7. Defendant's Motion to Dismiss, June 29, 1957.

8. Minute Order rendering oral decision on Motion to Dismiss, September 5, 1957.

9. Defendant's Motion and Judgment of Dismissal With Prejudice, September 12, 1957.

10. Notice of Appeal, October 7, 1957.

11. Plaintiff's (appellant) Statement of Points,
October 25, 1957.

/s/ JAMES M. FITZGERALD,

/s/ L. EUGENE WILLIAMS,

Attorneys for Appellant, City
of Anchorage.

Receipt of copy acknowledged.

[Endorsed]: Filed Nov. 15, 1957.

[Title of Court of Appeals and Cause.]

**MOTION OF OBJECTION TO APPELLANT'S
DESIGNATION OF RECORD ON APPEAL**

Comes Now the Appellee, through its attorney, John C. Dunn, and moves the court to delete from the record on appeal herein items 4 and 5 of the Designation of Record on Appeal heretofore filed by Appellant in the above-entitled court and cause.

This motion is made under Rule 15 of the above-entitled court and is supported by a Memorandum filed concurrently herewith.

/s/ JOHN C. DUNN,

Attorney for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed November 18, 1957.

[Title of Court of Appeals and Cause.]

MEMORANDUM SUPPORTING APPELLEE'S
MOTION OF OBJECTION TO APPELLANT'S DESIGNATION OF RECORD ON
APPEAL

Items 4 and 5 of Appellant's Designation of Record on Appeal are a motion for leave to file an amended complaint, the proposed complaint as amended, and a minute order denying leave to file an amended complaint. These items were filed in Civil Action 13,001 in the District Court for the Territory of Alaska, Third Division, Anchorage, Alaska.

This appeal and the sole matter before this court is taken in Civil Action numbered 13,503 by the District Court for the Territory of Alaska, Third Division, Anchorage, Alaska, a different and separate action from the one in which the order denying leave to file an amended complaint was entered.

This court has repeatedly held that only final orders are appealable. An order denying leave to file an amended complaint is not a final order, and, hence, not a proper subject of appeal. Should the refusal to permit the filing of an amended complaint constitute error, such would be a point to be raised on appeal, but only after the final determination of the case in which amendment of the complaint was sought; namely, in Civil Action 13,001, and not the action in which this appeal is taken.

The sole question before this court is whether or not the lower court erred in entering in judgment of dismissal in Civil Action 13,503.

No appeal has been taken in 13,001, from the order denying leave to file an amended complaint or otherwise; and the time of appeal has elapsed even if such an order were final and the proper subject of appeal. The minute order denying leave to file an amended complaint in 13,001 was entered June 14, 1957.

For these reasons, Appellee submits that said items 4 and 5 should be deleted from the record on this appeal.

/s/ JOHN C. DUNN,
Attorney for Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed November 18, 1957.

